

May 10 2023 4:06 PM

CONSTANCE R. WHITE
COUNTY CLERK
NO: 21-2-07268-4

Honorable Bryan Chushcoff
Noted for Hearing: May 19, 2023 9:00 AM

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

LISA EARL, on behalf of and THE
ESTATE OF JACQUELINE SALYERS,

Plaintiff,

v.

SCOTT CAMPBELL; the marital
community of Scott and Jane Doe Campbell;
and CITY OF TACOMA,

Defendants.

NO. 21-2-07268-4

PLAINTIFF'S ALTERNATIVE
MOTIONS FOR STATUTORY
DISQUALIFICATION, OR FOR
RECUSAL OF TRIAL JUDGE

Oral Argument Requested

PLAINTIFF'S ALTERNATIVE MOTIONS FOR STATUTORY
DISQUALIFICATION, OR FOR RECUSAL OF TRIAL JUDGE

EAR010-0001 7220364

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1 Within the last 48 hours, Plaintiff Lisa Earl discovered that the assigned trial judge, the
2 Honorable Bryan Chushcoff, has a history that connects him to one of the two key Tacoma
3 police officers involved in the incident of January 28-29, 2016, in which officer Scott Campbell
4 shot and killed Salyers. Pursuant to RCW 4.12.050, Plaintiff requests the disqualification of
5 Judge Chushcoff. In the alternative, pursuant to the appearance of fairness doctrine and the Due
6 Process clause, Plaintiff Earl moves for an order of recusal and asks that the order direct that
7 this case be reassigned to a new judge who is a visiting judge from another county. Finally,
8 Earl, the mother of Jacqueline Salyers, requests the opportunity to personally address the Court
9 concerning her grave doubts about this Court's ability to be impartial in this case.

10 I. STATEMENT OF FACTS

11 **A. Joseph admits striking the driver's window with his gun in an attempt to smash it**
12 **out. Earl maintains this was a negligent act that caused her daughter's death.**

13 Campbell never disputed the fact that he fired eight bullets at Salyers and killed her
14 shortly before midnight on January 28, 2016. He has always maintained that he fired intending
15 to kill her in order to stop her from driving towards him and striking him with her car. Four of
16 Campbell's shots hit Salyers. One of them entered the right side of her head and killed her
17 instantly according to the County Medical Examiner. All eight shots were fired from the
18 passenger side of the vehicle.

19 Campbell's partner that night was Officer Aaron Joseph. Joseph has always maintained
20 that he never fired his weapon that night. Until last week, Plaintiff Earl had no reason to
21 disbelieve him. Earl did not sue Joseph. However, she did sue the City alleging that it was
22 vicariously liable for the negligent acts of its agents, one of whom was Joseph.

23 Joseph admits that he deliberately struck the driver's window with his gun in order to
24 smash it, reach in, and then grab Salyers to prevent her from driving away. Plaintiff Earl
25 maintains this was an extremely negligent act. Not only did it risk causing an accidental
26 discharge of the gun, but attempting to smash her driver's window could have frightened

1 Salyers causing her to drive forward. According to Campbell, it was because she started to
2 drive right towards him that he had to kill her. If Joseph had not struck her window with his
3 gun, she would never have driven forward, Campbell would never have shot, and Jackie would
4 never have been killed.

5 **B. Procedural history of this case and *Beltran* case.**

6 This case was originally filed in federal court. Earl brought a negligence claim against
7 Campbell and against the City of Tacoma. Tacoma maintained that there is no such thing as a
8 claim for negligently causing a death when the slayer admits that he intentionally killed the
9 victim. Initially the federal judge agreed with Tacoma and dismissed the negligence claim.
10 However, a few months later, in *Beltran-Serrano v. Tacoma*, 193 Wn.2d 537 (2019), the
11 Washington Supreme Court ruled that there is a common law claim for negligence when a
12 police officer intentionally kills someone after having negligently handled an encounter with
13 the decedent. In *Beltran*, Tacoma police officer Michel Volk shot and killed a mentally ill man.
14 The Court held that a jury could find that she negligently handled the encounter, and that she
15 unreasonably and unnecessarily escalated her encounter with the decedent. Acknowledging the
16 Washington Supreme Court's decision in *Beltran*, the federal district court reversed its ruling,
17 reinstated Earl's negligence claim, and remanded the case to state court for trial.

18 In *Beltran*, the Court held that even where no single act establishes culpable negligence,
19 the combined effect of multiple acts can establish negligence. Consistent with *Beltran*, Plaintiff
20 Earl alleged that a number of acts – many of which were committed by Officer Joseph – were
21 negligent; and that Joseph's negligent acts, either alone or in combination with other negligent
22 acts – some of which were committed by Campbell – caused Salyers' death.

23 **C. Earl recently discovered physical evidence which contradicts Joseph's assertion**
24 **that he never fired his gun. Joseph's "dropped" magazine is missing a bullet. It is**
25 **now clear that Joseph's gun was discharged that night.**

26 Puzzling physical evidence was discovered at the scene of the shooting. One of Joseph's
extra magazines was found on the street pavement and lying next to it was a live bullet. Joseph

1 claimed ignorance as to how he could have “dropped” one of his magazines. Moreover, he
2 claimed he was not even aware that he had dropped it. Nor has Joseph ever had an explanation
3 for the live bullet found next to his dropped magazine.

4 Experts on both sides have always been at a loss to explain the presence of this live
5 bullet. Last week Plaintiff’s expert William Harmening considered this mystery again and
6 combed through the more than 1,000 pages of police reports. This led him to examine an
7 evidence log that documented the recovery of all the pieces of physical evidence found by police
8 investigators at the scene of the shooting. There, in very small print, Harmening found a
9 notation that the “dropped” magazine was *not* full – but was in fact *one bullet short*. *Harmening*
10 *Suppl. Report*, at pp. 3-4. (Appendix A to Lobsenz Decl.) Even counting the one live bullet
11 found lying next to it, the magazine was still one bullet short. It should have contained 12
12 bullets, but it only contained 11. The significance of that fact is laid out in detail in Harmening’s
13 supplemental expert report recently furnished to defense counsel pursuant to CR 26(e)(1)(B).

14 **D. On May 5, 2023, Earl discovered that in 2009 Officer Joseph was charged with two**
15 **felonies: Assault 2 for pointing a gun at his wife and Felony Harassment for**
16 **threatening to kill his fellow police officer Steven Storwick.**

17 The discovery that Joseph’s gun was a bullet short led Earl to further investigate
18 Joseph’s background. Earl found Court records in several civil cases involving Joseph and his
19 wife Lindsey Joseph including two Superior Court Protection Order Petition cases (one filed
20 by Mrs. Joseph one filed by Mr. Joseph). Documents in these court files make reference to a
21 criminal case in which Officer Joseph was charged with (1) Assault 2 – for threatening to shoot
22 and kill his wife; and (2) Felony Harassment, for threatening to TPD Officer Steven Storwick,
23 his former police partner who Joseph believed was having an affair with his wife.

24 A copy of the sworn Statement of the Arresting Officer (Detective Ken Lewis) was
25 found in one of the Protection Order court files (Appendix B). It states:

26 On August 4th, 2009, Lindsey Joseph reported to Tacoma Police Sergeant Corinna
Curtis that her husband, Tacoma Police Officer Aaron Joseph, had threatened to
kill one of his co-workers, She explained that ... Mr. Joseph was accusing her of

1 having an affair with his co-worker and former partner, Officer Steven Storwick.
2 She reported to police that Mr. Joseph called her and screamed something similar
3 to, "I'll kill that mother fucker!" She also described another incident that had
4 occurred at her parents' home ... in which she described Aaron Joseph becoming
5 emotionally unstable and threatening suicide. The wife reported that her husband
6 had put his service pistol to his head several times while making these suicidal
7 threats a month prior. Mrs. Joseph expressed concern for Storwick's safety.
8 Tacoma Police personnel began investigating the complaint, and TPD Sergeant
9 Curtis and TPD Lieutenant Gustason interviewed the involved parties.

10 *Statement of Arresting Officer, Appendix B-1, Cause No. 09-1-03733-9.*

11 The arresting officer interviewed TPD Officer Storwick who corroborated the
12 statements made by Mrs. Joseph. He also stated that the Tacoma Police Internal Affairs
13 department additionally interviewed Mrs. Joseph and other detectives interviewed other
14 witnesses who further corroborated what she said:

15 Storwick told investigators that due to his former partner's questionable
16 emotional state and anger, he was concerned for both his and Lindsey Joseph's
17 well-being.

18 ... Detective Lewis and Sergeant Portmann found that the involved parties'
19 statements were very consistent and corroborated with the details of the alleged
20 incidents. After consulting with the Pierce County Prosecutor's Office, Portmann
21 and Lewis took Aaron Joseph into custody for the assault and threats ... on
22 August 13th, 2009.

23 Appendix B, at p. 3. On August 14, 2009, a Protection order was entered by the Honorable
24 Katherine Stolz, pursuant to RCW 10.99 and RCW 26.50. (Appendix C).¹

25 **E. Discovery revealed that the felony charges were dismissed so that the case could
26 be refiled and "more appropriately" resolved in District Court.**

27 Roughly nine months later, then Pierce County Prosecutor, Mark Lindquist moved for
28 dismissal with prejudice. Lindquist represented that the prosecution "believes that it would
29 have great difficulties at trial and would likely not be successful at trial." He explained that
30 "the victim," Mrs. Joseph, wanted "to see the case resolved because she did not want the case

¹ Ordinarily such an order prohibits the restrained person from possessing a firearm. 18 U.S.C. §922(g)(8) (Appendix C, at 2). But "[a]n exception exists for law enforcement officers ... when carrying department/government-issued firearms. 18 U.S.C. §925(a)(1)." *Id.* Judge Stolz's order commands the Chief of Tacoma Police Department, "to maintain a record of this Order Prohibiting Contact and enforce its provisions."

1 to go to trial.” Appendix D-1.

2 Given these facts and other challenges the State would have to overcome at trial,
3 this case is more appropriately resolved in Pierce County District Court.

4 Appendix D-2. On May 12, 2010, the Honorable Vicki Hogan granted the Prosecuting
5 Attorney’s motion and entered an order dismissing the felony charges with prejudice. *Id.*

6 **F. The misdemeanor charge was also eventually dismissed.**

7 On May 5, 2023, Earl made a Public Records Act request for copies of the District Court
8 records. These records show that a misdemeanor charge was brought, and Joseph was granted
9 a deferred prosecution. After he completed the deferred prosecution the misdemeanor charge
10 was dismissed. The district court did not include a copy of the deferred prosecution order which
11 would show what conditions were imposed and the physical file was destroyed in July 2017.

12 **G. In May of 2013, the Honorable Bryan Chuschcoff granted Joseph’s motion for
13 expungement of all nonconviction data concerning the 2009 felony charges.**

14 Two days ago on May 8, Earl’s counsel discovered that in 2013, about four years after
15 the felony charges were dismissed by Judge Hogan, Officer Joseph filed a *Petition to Expunge
16 Arrest Record* pursuant to RCW 10.97.060. (Appendix E). In his motion, Joseph’s attorney
17 represented that “more than three years have passed, and Mr. Joseph has not been arrested nor
18 charged with any crime during the intervening period.” *Id.* at E-2.

19 On May 17, 2013, Judge Chushcoff granted that Petition and entered an *Order
20 Regarding Arrest Record* (Appendix F) which ordered

21 [T]hat all non-conviction data of the record of AARON JOSEPH shall be deleted
22 and expunged from any state record open to the public.²

23 **H. Discovery revealed that when Joseph threatened to shoot and kill his wife, he
24 smashed his gun against a door frame. This newly discovered evidence supports
25 both Plaintiff’s existing *Beltran* negligence claim against the City, and a new claim
26 of negligent retention against the City.**

The recently discovered civil protection order case records pertaining to Joseph’s 2009

² A copy of the *Statement of the Arresting Officer* (Cause No. 09-1-03733-9), was filed in Mrs. Joseph’s civil protection order case (*Lindsey Joseph v. Aaron Joseph*, Cause No. 09-2-02917-8).

1 threats to kill his wife also contain evidence regarding the details of Joseph's reckless handling
2 of his gun. In Mrs. Joseph's Petition for a Protection Order, she said she described her
3 husband's "most recent" act of domestic violence:

4 The most recent incident occurred at my parents' home . . . I told him that I wanted
5 a divorce, he then reached in his backpack that he carried in the house and had a
6 pistol gun in his hand. At first it was a threat against himself, putting the gun to
7 his head and claiming that he would go and disappear and no one would ever find
8 him. "I have nothing to live for, I will just kill myself" It then escalated . . .
9 Putting the gun to his head and claiming that he will kill himself right in front of
10 me. Then . . . I followed him inside the house. . . I was trying to get the gun from
11 him, and ***he then banged the gun against the frame of the door of my parents
bedroom*** and then put the gun to my head (for no more than 5 seconds) and said
"It will be like Braim, I will do you, and then me" The night continued on, before
eventually he fell asleep with the gun in his hand, and I layed in bed next to him
with my hand on his stomach (making sure he didn't leave to go hurt himself

12 Petition, at 4 (Appendix G) (misspelling/punctuation in original) (emphasis added).

13 This discovery of a prior incident – reported to the TPD – in which Joseph recklessly
14 smashed his gun against an object – is of critical relevance to this case because immediately
15 before Campbell started shooting to kill Jackie Salyers, Joseph smashed his gun against Salyers'
16 driver window, one of many negligent acts committed by Joseph that night. As noted in the
17 supplemental reports of Plaintiff's experts, this kind of improper handling of a gun can cause it
18 to accidentally fire. That he had done so before, and presumably understood the risk of doing
19 so, is relevant to the trier of fact's understanding of his actions. Further, as noted above,
20 Joseph's "dropped" magazine was one bullet short. This indicates that Joseph's gun *did* fire
21 once on the night Salyers was killed. Thus, the discovery that the City already knew that Joseph
22 had a prior history of improperly handling a pistol in this manner strengthens the *Beltran*
23 vicarious liability negligence claim against the City.

24 Moreover, as noted below, this newly revealed fact provides a basis for an additional
25 claim of negligent retention against the City. Given what the TPD knew of Joseph's gun
26 handling conduct in 2009, the police department should have fired Joseph. If it had fired Joseph
in 2009, he would not have been accosting Salyers in 2016, frightening her by smashing a gun

1 against her window, causing her to start driving forward, and Campbell would never have shot
2 her dead. This reasoning is supported by witness Natasha Hudson who heard a male voice say,
3 “See what you made me do,” right after she heard gunshots.

4 **I. Additional discovery revealed that Officer Joseph sent a letter of complaint to**
5 **Judge Chushcoff, asserting that a Court Commissioner was biased against men**
6 **and had improperly threatened him with sanctions for abusing the court system.**

7 In addition to Mrs. Joseph’s Protection Order Petition, Officer Joseph filed his own
8 counter-petition for a protection order seeking protection from his wife. *Aaron Joseph v.*
9 *Lindsey Joseph*, Cause No. 10-2-01293-7. On May 12, 2010, Commissioner Megan Foley
10 dismissed this petition. (Appendix H).

11 Upset with this defeat, Officer Joseph sent a letter of complaint to Judge Chushcoff on
12 May 26, 2010. On May 5 of this year, Case Manager Jule Freeman found a copy of Joseph’s
13 complaint letter in the court file for this Protection Order Petition.³ Joseph addressed his
14 complaint letter to “Judge Bryan Chushcoff” and labeled the “Subject” of his letter: “Complaint
15 against Court Commissioner Megan Foley.” (Appendix I).⁴ In the letter, Joseph stated:

16 Commissioner Foley also warned me that any further attempts to “use the courts”
17 for my own purposes would lead to sanctions. Court commissioner Foley is
18 obviously bias [sic] against men and has the audacity to threaten a citizen with
19 sanctions for employing the system in place to protect them.

20 Appendix I-3. Joseph informed Judge Chushcoff that he intended to file another protection
21 order petition against his wife. He asked Judge Chushcoff to “[please listen to the court
22 proceedings from both hearings” to understand why he thought Commissioner Foley was acting
23 on her “personal prejudices.” *Id.* Joseph concluded, “I think Commissioner Foley is biased
24 against men for whatever reason”; is “not ... very knowledgeable in regard to criminal laws”;
25 and that by “using her position of authority to intimidate [she] is [acting] very
26 unprofessional[ly].” *Id.*

³ Someone attached the letter to a captioned pleading labeled “Letter from Petitioner” and filed it in the court file. The complaint letter is dated May 26, 2010 and it was filed in the court file on the same day.

⁴ Presumably he addressed his letter to Judge Chushcoff because he was the Presiding Judge of the Court.

II. STATEMENT OF THE LAW OF RECUSAL

A. The appearance of impartiality, rather than actual bias, is the applicable standard.

“[I]n deciding recusal matters, actual prejudice is not the standard.” *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995).⁵ “The law goes farther than requiring an impartial trial judge, it also requires that the judge appear to be impartial.” *State v. Romano*, 34 Wn. App. 567, 569-70, 662 P.2d 406 (1983). “[J]ustice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14 (1954). This “stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties.” *In re Murchison*, 349 U.S. 133, 136 (1955).

B. The test for the appearance of fairness is an objective test. It turns on whether a reasonable person would have reason to question a judge’s ability to be impartial.

The applicable test is an objective test. The question is whether a reasonable person would question the judge’s ability to be impartial. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 104, 283 P.3d 583 (2012).⁶ Under the unique circumstances of this case, any reasonable objective observer would have reason to question this Court’s ability to be fair and impartial.

First, Joseph attempted to enlist the aid of Judge Chushcoff by implicitly asking him to chastise Commissioner Foley, who had simply and properly told Joseph that if he continued to try to use the courts for his own purposes she would impose sanctions upon him. Had the matter ended here, this alone would be enough for a reasonable observer to question why Joseph thinks he can get Judge Chushcoff, Commissioner Foley’s “superior,” to take his side and protect him from Judge Foley’s allegedly improper threat.

But the matter did not end there. Four years later, in 2013, Joseph filed a petition for expungement of nonconviction data and Judge Chushcoff granted it. By ordering nonconviction data to be expunged from all public records, the order greatly benefited Officer

⁵ A trial judge’s “own inquiry into actual bias ... is not one that the law can easily superintend or review.” *Caperton v. Massey Coal*, 129 S.Ct. 2252, 2263 (2009). That is why the presence of actual bias is not the test.

⁶ In *Tatham* the Court held that the trial judge should have disclosed his personal relationship with the lawyer representing the wife in the divorce proceeding that he presided over.

1 Joseph. Regardless of whether entry of that expungement order was proper or not, it had the
2 effect of destroying evidence bearing upon the negligence claims brought against Tacoma.

3 **III.**

4 **THE TIMING OF DISCLOSURE HAS NOT DEPRIVED EARL OF HER**
5 **STATUTORY RIGHT TO DISQUALIFICATION**

6 “Those coming before the court have a fundamental right to an impartial decision-
7 maker.” *Godfrey v. St. Michelle Wine*, 194 Wn.2d 957, 959, 453 P.3d 992 (2019). “To protect
8 this fundamental right, Washington statutes liberally allow litigants to disqualify a judge
9 assigned to their case without establishing actual prejudice –but, usually, only before that judge
10 has made a discretionary ruling or order in the case.” *Id.* “A timely affidavit of prejudice must
11 be granted.” *Id.* RCW 4.12.050 grants any party in any action the right to disqualify a judge
12 from hearing the matter provided that the statutory notice is filed and brought to the judge’s
13 attention *before* the judge has made any discretionary ruling in the case. RCW 4.12.050(1)(a).
14 This statute provides “a mechanism to disqualify a Superior Court judge without showing actual
15 prejudice.” *Godfrey*, at 961. “A timely affidavit of prejudice must be granted.” *Id.* However,
16 “[a] litigant who proceeds to trial *knowing of a potential bias* by the trial court waives his
17 objection and cannot challenge the court’s qualifications on appeal.” *In re Duffy*, 78 Wn. App.
18 579, 582, 897 P.2d 1279 (1995) (italics added).

19 Until this week, Plaintiff did not know of the “potential bias of the trial court.” She had
20 no knowledge that this Court had been contacted by Officer Joseph in connection with his
21 complaint alleging that Judge Foley was biased against him because he was a man. Nor did
22 the Plaintiff know that Judge Chushcoff had granted Officer Joseph’s motion to expunge all
23 records of his wife’s complaint that he threatened to kill her, his fellow officer, and himself.

24 “Once a litigant learns of grounds for disqualification of the judge hearing a matter, she
25 must move promptly to object.” *Duffy*, at 582. Plaintiff Earl has done that.⁷ But Earl did not

26 ⁷ In *Duffy*, “the basis for disqualifying [the trial judge] was disclosed on the record *prior* to the court’s first
discretionary ruling and again immediately before trial.” *Duffy*, at 582-83. Thus, the litigant knew the facts took
(Footnote continued next page)

1 learn of these facts until after the trial court had conditionally granted Earl's motion for leave
2 to present witness Natasha Hudson's trial testimony by Zoom.⁸ That order was entered on April
3 21, 2023. While that ruling involves discretion, it is not the type of discretionary ruling which
4 precludes a litigant from making a statutory disqualification motion by filing an affidavit of
5 prejudice. The decision in *Godfrey* makes it clear that rulings dealing with administrative
6 matters such as calendaring, do not preclude a subsequent statutory motion for disqualification.
7 A ruling allowing an incarcerated witness to testify remotely by Zoom is similar to a
8 "calendaring" ruling which does *not* affect the timeliness of an affidavit of prejudice.⁹

9 Assuming that this Court agrees that under *Godfrey*, its April 21, 2023 order is an
10 *exempted* discretionary ruling, then Earl hereby exercises her statutory right to disqualify the
11 currently assigned trial judge (*Lobsenz Declaration*, Appendix J). On the other hand, if this
12 Court believes that this was *not* an exempted discretionary ruling, Earl has filed this alternate
13 motion for recusal on appearance of fairness and due process grounds.

14 Plaintiff Earl assumes that when this case was reassigned from Judge Quinlan to Judge
15 Chushcoff, this Court never realized that it had previously entered an expungement order in the
16 Joseph criminal case. Also, this court may not have realized that Joseph was a key witness in
17 this case, and a participant in the event that culminated in the killing of Earl's daughter. Thus,
18 Plaintiff does not allege any knowing failure to disclose these facts.

19 Nevertheless, had Earl known these facts before May 5, she would have filed an
20 affidavit of prejudice pursuant to RCW 4.12.050 before any discretionary ruling of any kind
21

22 no action, thereby affirmatively waived any objection. *Id.* at 583. In this case, there was no "knowing" waiver
23 because the trial judge's prior participation in the felony criminal case against Joseph was never disclosed to Earl.

⁸ Hudson is currently serving a sentence in an Idaho prison and thus she cannot come to Tacoma to testify.

24 ⁹ "Certain judicial acts are carved out in a proviso, including acts such as arranging the calendar." *Godfrey*, at
25 962. *Godfrey* holds that an order "setting, renoting, and resetting the pretrial motions" is within the statutory
26 exception. Such acts "do not affect the timeliness of an affidavit of prejudice regardless of whether they involve
discretion." *Id.* The Court held that an order extending a witness disclosure deadline was within the calendaring
exception because "even if it involves discretion," it was "not a judicial act that renders an affidavit of prejudice
untimely." *Id.* at 964. Clearly, an order allowing a witness to testify remotely falls within the same exception.

1 had been made. The facts described above cause Earl, as they would any objective observer,
2 to doubt this Court's ability to be impartial in this case. For example, Joseph's history with this
3 Court give the appearance that this Court is sympathetic to police officers, even when they have
4 committed acts of serious criminal violence and have recklessly handled a gun. Given the
5 recent revelations in discovery, as well as the benefit to Joseph of the Court's action, an
6 objectively reasonable observer would have reason to doubt this Court's ability to be impartial
7 in this case.

8 IV. DISQUALIFICATION IS REQUIRED

9 Canon 2.11(A) of the Code of Judicial Conduct provides: "A judge *shall* disqualify
10 himself or herself in any proceeding in which the judge's impartiality might reasonably be
11 questioned" (Italics added).¹⁰ Disqualification is also required by the appearance of fairness
12 doctrine. *Tatham*, at 96; *Sherman*, at 205; *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156
13 (1972). Disqualification is also required by the due process clause. *See Aetna Life Ins. v. LaVoie*,
14 475 U.S. 813, 828 (1986) (court previously decided one of the issues in the case to be tried).
15 Here, given that in 2013 this court authorized the destruction of records showing that a Tacoma
16 police officer threatened to kill people and hit an object with his gun risking accidental
17 discharge, Judge Chushcoff's recusal is required.

18 Whoever presides over the trial of this case will necessarily have to make a host of
19 evidentiary rulings concerning Joseph's conduct and that of other TPD officers. The trial judge
20 will need to rule on whether failure of the TPD to seize Joseph's gun on the night of Salyers'
21 death was a negligent failure to preserve critical evidence which triggers the spoliation doctrine.
22 The judge will also have to decide whether to permit Earl to amend her complaint to allege (1)
23 a negligence claim against Joseph himself, and (2) a claim of negligent retention against
24 Tacoma. Given this Court's history with Joseph, an objectively reasonable observer would
25

26 ¹⁰ Both the Rule and Comment 1 expressly state that when disqualification is required, the judge must not hear or decide any matters in the case "*regardless* of whether a motion to disqualified is filed." (Italics added).

1 have reason to doubt this court's ability to be impartial in this case.

2
3 **V. CONCLUSION**

4 Since Washington's earliest days, the Supreme Court has insisted on strict adherence to
5 the principle that the appearance of impartiality must always be honored:

6 Caesar demanded that his wife should not only be virtuous, but beyond suspicion;
7 and *the state should not be any less exacting with its judicial officers, in whose*
8 *keeping are placed not only the financial interests, but the honor, the liberty, and the*
9 *lives of its citizens....*

10 *State ex rel. Barnard v. Bd. of Education*, 19 Wash. 8, 18, 52 P. 317 (1898) (italics added). In
11 this "post-George- Floyd" era, citizens are increasingly concerned that the police officer use of
12 deadly force is often unwarranted and that police are not being held accountable. To insure the
13 appearance of justice, the law "may sometimes bar trial by judges who have no actual bias."
14 *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980). This is one of those cases.

15 Under *Godfrey*, the Court's prior ruling granting permission to present remote testimony
16 does not preclude her exercising her statutory right to disqualify the court and she is asserting
17 that right (Appendix J). Alternatively, Earl submits that under the appearance of fairness
18 doctrine and the Due Process clause the court must recuse itself. The reassignment of this case
19 from Judge Quinlan to this Court is the *second time* that this case was suddenly reassigned to a
20 judge whose impartiality a reasonable objective observer would have reason to doubt.¹¹ Earl
21 asks the Court to enter an order directing that the case be reassigned to an out-of-county judge.

22 DATED this 10th day of May, 2023.

23 *s/James E. Lobsenz*

24 James E. Lobsenz WSBA #8787

Jennifer Wellman, WSBA #29193

Attorneys for Plaintiff

25 ¹¹ Months after the case was reassigned to her from Judge Ashcraft, Judge Adams informed the parties that she
26 was married to a local police officer, and she invited them to make any appropriate motion (Appendix K). Earl
then made a recusal motion which Judge Adams granted. (Appendix L). The case was then reassigned to Judge
Quinlan, and then reassigned again to this Court.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ VIA COURT'S EMAIL SERVICE to the following:

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DATED this 10th day of May, 2023.

s/Deborah A. Groth
Deborah A. Groth, Legal Assistant